Supreme Court, U.S.
F I L E D

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No.

In the
Supreme Court of the United States

October term 1995

Richard L. Frazier, Petitioner

vs.

James B. King,
Director of the Office of Personnel Management

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

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65pp

QUESTION PRESENTED FOR REVIEW

In a federal employment labor relations arbitration arising from a collective bargaining agreement, wherein the parties have submitted the question of whether the grievant's suspension was for just cause, and the arbitrator determines that the grievant sexually harassed co-employees but that nonetheless the suspension was without just cause because of the employer's tolerance of the grievant's misconduct, did the Court of Appeals improperly exercise review to determine whether the arbitrator had applied the correct standard of law to determine whether the grievant had sexually harassed co-employees?

PARTIES TO THIS PROCEEDING

The case caption lists all parties.

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TABLE OF CITATIONS

1. James B. King v. Richard L. Frazier, No. 94-3670, December 19, 1995, United States Court of Appeals for the Federal Circuit (Judgment).

2. James B. King v. Richard L. Frazier, No. 94-3670, September 28, 1994, United States Court of Appeals for the Federal Circuit (Order granting rehearing, miscellaneous docket number 389).

3. James B. King v. Richard L. Frazier, No. 94-3670, February 24, 1994, United States Court of Appeals for the Federal Circuit (Order denying petition for review, miscellaneous docket 389).

4. In the matter of United States Department of Housing and Urban Development and Richard L. Frazier, Grievant, October 19, 1993, Federal Mediation and Conciliation Service, Arbitration No. 92-05883, Report On Reconsideration Of Arbitration Award Mandated By Office of Personnel Management (By Arbitrator Joseph Glasser).

5. In the matter of United States Department of Housing and Urban Development and Richard L. Frazier, Grievant, December 9, 1992, Federal Mediation and Conciliation Service, Arbitration No. 92-05883, Arbitration Award.

TABLE OF AUTHORITIES

Chrysler Motors v. International Union
959 F.2d 685 (7th. Cir. 1992)
cert. denied 113 S.Ct. 304 ..... 9, 11, 12

Communications Workers v. S.E. Elec. Co-op
882 F.2d 467 (10th. Cir. 1989) 9, 11, 12

Cooper v. United States
639 F.2d 727 (Ct. Cl. 1980) 6

King v. Hillen
21 F.3d 1572 (Fed. Cir. 1994) 7

Newsday v. Long Island Typographical Union
915 F.2d 840 (2nd. Cir. 1990) 9, 11

Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters
969 F.2d 1436 (3rd. Cir. 1993)
cert.denied 113 S.Ct. 660 ..... 9, 11

United Paperworkers International Union v. Misco
484 U.S. 29 (1987) 10

W. R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers
461 U.S. 757 (1983) 10

BASIS FOR THIS COURT'S JURISDICTION

This court has jurisdiction under 28 U.S.C. section 1254 (1):

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) [omitted].

TABLE OF LAWS IN ISSUE

1. 5 U.S.C. sec. 7703 (d)
2. 5 U.S.C. sec. 7513

STATEMENT OF THE CASE AND DECISIONS

The issue presented by the appellant to the Court of Appeals and decided by that court was irrelevant to the arbitration submission and award. Therefore, this Court should reverse the judgment of the Court of Appeals and reinstate the arbitration award. As the confusion in the Court of Appeals stems from the unfocussed presentation of the case to the arbitrator and the inartful wording of the arbitrator's award, it will help to describe the case from the first proceeding.

The United States Department of Housing and Urban Development (hereinafter, "HUD") performed an investigation of a complaint by a fellow employee of Richard Frazier that he was sexually harassing her. Mr. Frazier was not a management employee, a fact which had considerable significance to the arbitrator. HUD concluded that Mr. Frazier had engaged in sexual harassment and "notoriously disgraceful conduct." Pursuant to the grievance procedures afforded him by the applicable collective bargaining agreement, he sought arbitration of whether HUD had just cause to suspend him. Thus, the forum and purpose of the case was one of labor relations between a disciplined employee and management.

At the arbitration, HUD presented evidence of Mr. Frazier's misconduct. Mr. Frazier, through counsel, attempted to impeach the credibility of HUD's witnesses, to minimize the significance of their complaints about him, and to demonstrate that HUD had failed to meet its own

regulations for the timeliness of handling complaints. One of the points which Mr. Frazier's defense stressed was that management had known of his conduct for many years and had not disciplined him previously.

The arbitrator's decision found that Mr. Frazier's conduct was notoriously disgraceful. He also found that the conduct was known to management and that management had done nothing to halt it. The arbitrator, therefore, concluded that Mr. Frazier did not know that his conduct was wrong. The arbitrator concluded that, since the grievant lacked knowledge that his conduct was wrong, he could therefore not have been "guilty" of sexual harassment. The decision and award, accordingly, stated, "The grievant is not guilty of sexual harassment so that the 60-day suspension was not for just cause."

This conclusion has been the focus of each attack on the decision. It is clearly not the correct legal analysis. Unfortunately, its inadequacy has obscured the subtle change made by the arbitrator upon the Petition for Reconsideration.

The Petition for Reconsideration argued that the arbitrator had misapplied the law governing sexual harassment in a workplace. The Office of Personnel Management (hereinafter, "OPM") asserted in its petition that the arbitrator had applied a criminal law standard rather than the applicable standard in 5 U.S.C. sec. 7513 of whether the employee's conduct impaired the efficiency of the service. The arbitrator's report on reconsideration

observed correctly that HUD had not presented any evidence at all on whether Mr. Frazier's conduct had impaired the efficiency of the Hartford office. Indeed, it had never even mentioned the concept. The report continued, most significantly, that the arbitrator must make his determination in the light of the record as a whole and the totality of the circumstances. The circumstances which the arbitrator found persuasive are stated in the last paragraph: "the agency by its own admission...has done nothing to "intervene promptly and effectively to put end [sic] to workplace sexual harassment." In short, the arbitrator's view, albeit embodied in a poorly drafted report rather than in the text of the award, is that the agency had no just cause to suspend an employee for misconduct that it had long tolerated. This issue is not addressed in any brief or petition of the OPM at any level.

OPM sought review in the Court of Appeals for the federal circuit. That court initially denied review. It based its denial on the ground that HUD acquiesced, at least tacitly, to the standards and burdens of proof used by the arbitrator, thus limiting the extent of the impact of the arbitrator's decision upon civil service law.

Upon OPM's Petition For Rehearing of the denial, the Court of Appeals decided to review the arbitration award. The order granting rehearing was based on the court's perception that the arbitration award appeared to contradict the standards enunciated in King v. Hillen, 21 F.3d 1572 (Fed. Cir. 1994) governing workplace sexual harassment.

Uitimately, the Court of Appeals held that the arbitrator had improperly analyzed sexual harassment from the point of view of the accused harasser, rather than from the point of view of the victim. It then took the arbitrator's findings regarding Mr. Frazier's conduct and made its own determination that Mr. Frazier had sexually harassed women in the HUD office. Lastly, the co rt presumed a nexus between Mr. Frazier's misconduct and the efficiency of the service, citing Cooper v. United States, 639 F.2d 727 (Ct. C Cl. 1980). Again, the Court of Appeals did not address the issue of whether the employer's prolonged tolerance of the misconduct rendered the suspension without just cause, or whether the arbitrator was empowered to take that circumstance into consideration in fashioning his remedy.

ARGUMENT

This case is not about sexual harassment. Everyone has conceded that Mr. Frazier's conduct at work was disgraceful. This case is about the power of federal Court of Appeal to overturn an arbitrator's award without even considering the basis of the award. This case is about an appellate decision which correctly applies the wrong law; that is, it decided an issue that was immaterial to the arbitration award. This case is about an appellate decision which gives no thought to the applicable standards for review of the arbitrator's award, and does not even discuss the inconsistency of result among four different circuits which reviewed an arbitrator's award in a workplace sexual harassment matter. See Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters, 969 F.2d 1436 (3rd Cir. 1993), cert. denied 113 S.Ct. 660; Chrysler Motors v. International Union, 959 F.2d 685 (7th Cir. 1992), cert.denied 113 S.Ct. 304; Newsday v. Long Island Typographical Union, 915 F.2d 840 (2nd Cir. 1990); Communications Workers v. S.E. Elec. Co-Op, 882 F.2d 467 (10th Cir. 1989). At this stage of the proceedings the case is not about Mr. Frazier, but about the power of an arbitrator to consider the conduct of the employer in determining appropriate discipline of an employee's misconduct, and about the power of the Court of Appeals to review that consideration. This issue has not been determined below, and the case cannot be decided without it.

This court has had frequent opportunity to consider the general guidelines for reviewing arbitration awards. As a general matter, the power of the court to review

arbitration awards is extremely limited. United Paperworkers International Union v. Misco, 484 U.S. 29 (1987). Indeed, if the award is based essentially on the contract and the parties' submission, the court is bound to enforce it. W. R. Grace & Co. v. Local Union 759, International Union of United Rubber, 461 U.S. 757, 764 (1983). Ironically, in the case at bar, the issue submitted by the parties was whether the employer had just cause to suspend Mr. Frazier, not whether Mr. Frazier had sexually harassed women in the office, or even whether his harassment diminished the efficiency of the office.

The courts, nonetheless, make an independent review of claims that the arbitrator's award is contrary to public policy. W. R. Grace & Co., supra at 766. Although OPM has never expressly invoked this exception. It has never stated its issue on review as a claim that Arbitrator Glasser's award interferes with the government's enforcement of a public policy against sexual harassment in government offices. It would be a strange issue to raise, in light of the report on OPM's original request for reconsideration. That report expressed the arbitrator's provision that the way to have enforced the policy would have been for HUD to have taken note of Mr. Frazier's harassment and forbidden it clearly. Thus, far from contradicting public policy by letting a non-management employee get away with sexual harassment, the award was intended to promote the public policy by penalizing management for tolerating the employee's sexual harassment of other employees. The Court of Appeals, however, never considered that point.

The question is whether Arbitrator Glasser could have considered the misconduct of the employer in fashioning a remedy for the misconduct of the employee. The importance of this issue is especially apparent when one looks at the four circuit court opinions which have reviewed arbitrator's awards in cases of employee discipline for sexual harassment. In Stroehmann, the Court of Appeals reversed an arbitrator's reinstatement of an employee when the company had suspended him indefinitely pending an investigation. The court decided that public policy shifts the burden: an employer must be able to combat sexual harassment by suspending an employee until it is proven that the employee did not sexually harass another. In Newsday, the court reversed an arbitrator's reinstatement of a dismissed employee who had been warned on several previous occasions to desist his harassing behavior. In contrast, in Chrysler Motors, where the employee had never been previously warned or disciplined before being discharged, the court observed that "the arbitrator is free to bring his informed judgment to bear in order to reach a fair solution to a problem. This is especially true when it comes to formulating a remedy." 959 F.2d at 688 (Quoting from Misco, 461 U.S. at 41). Similarly, in Communications Workers, the court upheld an award by the arbitrator which reduced a discharge to a thirty-day suspension. The court there held that the totality of the circumstances permitted the arbitrator's award. The court concluded, "We cannot substitute our understanding of the workplace and judgment of Mr. Gray's conduct..." 882 F.2d at 467.

The Court of Appeals in the case at hand never considered the scope of the arbitrator's powers. It merely examined his analysis of sexual harassment and found it to be incorrect. The cases are myriad that a court is not to overturn an arbitration award for errors of law unless the arbitrator clearly disregarded the law. Here, Arbitrator Glasser observed that "the evidence is sufficient to show that the grievant did make many statements to [co-employees] which they found distressful" and that his conduct "could be perceived by most as no less than notoriously disgraceful." Thus, in fact, Arbitrator Glasser did make the findings required by a proper application of the law defining sexual harassment. Beyond that, however, the initial decision and later report on reconsideration is an inarticulate approach to the problem of discipline by an employer who has consistently tolerated the behavior which underlies the discipline. Applying the Chrysler Motors and Communications Workers analyses, the court should defer to the arbitrator's expertise in making that finding. The Court of Appeals, however, not only failed to defer to the arbitrator's expertise, it did not even recognize the issue upon which deference was due.